



VIA CERTIFIED MAIL and E-MAIL

July 22, 2021

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**SIXTY-DAY NOTICE OF INTENT TO SUE PURSUANT TO THE
ENDANGERED SPECIES ACT VIOLATIONS IN THE GILA BOX RIPARIAN
NATIONAL CONSERVATION AREA IN ARIZONA**

Dear Mses. Haaland, Williams, Culver, and Lueders, and Messrs. Suazo, Humphrey and Feldhausen,

The Secretary of the Interior, U.S. Bureau of Land Management ("BLM") Director, Arizona State Director, and Gila District/Gila Box Riparian National Conservation Area Manager, the U.S. Fish and Wildlife Service ("USFWS") Director, Region Director and Arizona State Supervisor are hereby notified by the Center for Biological Diversity ("Center") and

Maricopa Audubon Society ("Maricopa Audubon") of our intention to file suit 60 days after the filing of this Notice pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), for unremedied violations of the ESA 16 U.S.C. §§ 1531-1544 and its implementing regulations, 50 C.F.R. §§ 402.01-402.17.

We file this Notice as the result of failure of the BLM and USFWS to reinitiate ESA Section 7 consultation on final agency actions, including the issuance of term grazing permits, allotment management plans ("AMPs"), and annual operating instructions ("AOIs") or plans ("AOPs"), authorizing grazing on six allotments within the Gila Box Riparian National Conservation Area ("GBRNCA") regarding the ongoing impacts of trespass and unauthorized permitted cattle livestock grazing on Threatened and Endangered Species and their Critical Habitat.

In this Notice, the Center and Maricopa Audubon provide pertinent background information, and identify the legal violations that we intend to challenge in federal court should BLM and USFWS fail to correct these violations within sixty (60) days.

FACTUAL BACKGROUND

GBRNCA is home to or important to the recovery of numerous ESA-listed species dependent on aquatic and riparian habitat, including Yellow-billed Cuckoo, Southwestern Willow Flycatcher, Gila Chub, Gila Topminnow, Desert Pupfish, Spikedace, Loach Minnow, and potentially more. In carrying out their consultation duties pursuant to section 7 of the ESA regarding the impact of final agency actions, including the issuance of term grazing permits, AMPs, and AOIs or AOPs, authorizing grazing for the Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci and Bull Gap allotments within GBRNCA challenged in this action, the BLM and USFWS have determined that the effects of domestic livestock grazing are not likely to adversely impact these species or adversely modify their designated Critical Habitat. These determinations are primarily based on BLM commitments to exclude streamside habitat from cattle and to conduct regular monitoring of riparian areas in order to ensure that the fencing exclusions remain intact and effective. These commitments have not been fulfilled.

USFWS' May 21, 2012, Biological Opinion states:

“Conservation Measures...The BLM will implement the following conservation measures to reduce adverse effects to listed species and critical habitat from authorized livestock grazing actions on BLM lands within the designated allotments listed in Table 1 [Morenci, Zorilla, Gila, Johnny Creek, Bonita Creek, Bullgap]. ...

The BLM will: ... Work to remove unauthorized livestock from areas excluded or otherwise closed to grazing that provide a benefit to listed species and their habitat (see Table 4 for a current list of exclusions [Gila Box...Associated Allotment...Johnny Creek, Bonita Creek, Bull Gap, Morenci, Zorilla, Gila...Large complex enclosure intended to exclude livestock from the riparian areas of the Gila Box Riparian National Conservation Area (RNCA). The enclosure includes topography, allotment boundary fences, pasture fences, and gap fencing. It also includes water gaps constructed across the upper end of Bonita Creek (reservation

boundary), the lower end of Eagle creek, the upper RNCA boundaries of San Francisco River and the Gila River.¹)² ...

After riparian areas are closed to grazing, livestock use will not be authorized until fencing or other control methods are in place³ ...

Inspect fences used for excluding livestock from BLM managed riparian areas/pastures before livestock are turned out⁴ ...

Southwestern willow flycatcher... The BLM will implement the following guidelines: ... Habitat Management Guidelines:

- a. Livestock grazing will be excluded within occupied and un-surveyed, suitable habitat during the breeding season (April 1-September 1).
- b. Manage suitable flycatcher habitat so that suitable characteristics are not eliminated or degraded.
- c. Manage riparian areas to allow natural regeneration and, therefore, allow those sites with potential to progress into suitable habitat."⁵ ...

Grazing has been excluded from all riparian areas administered by the BLM within the Bonita Creek, Johnny Creek, and Bull Gap allotments, although BLM authorizes annual livestock drives down the riparian corridor on the Bonita Creek Allotment.⁶

Under the Gila Box RNCA Plan, grazing in Bonita Creek would be limited to trailing once or twice per year to move livestock between pastures on the Bonita Creek allotment.⁷ ...

The Bonita Creek (46160), Johnny Creek (46150), and Bull Gap (46170) allotments border Bonita Creek, or in the case of the Bonita Creek allotment, includes Bonita Creek, and portions of its watershed on the RNCA. Under the Gila Box RNCA Plan, grazing in Bonita Creek would be limited to trailing once or twice per year to move livestock among pastures on the Bonita Creek allotment.⁸ ...

Gila chub...Amount or Extent of Take... The FWS does not anticipate the proposed action will result in incidental take of Gila chub because populations are protected by exclosures ... Incidental take of Gila chub is not reasonably certain to occur in the Bonita Creek Area because the areas that have Gila chub now or in the future are excluded from livestock grazing and trailing of livestock would take place

¹ Memorandum to: Tom Dabbs, District Manager, Bureau of Land Management, Gila District, from USFWS Arizona Field Supervisor Steven L. Spangle, RE: Biological Opinion on the Gila District Livestock Grazing Program, May 21, 2012, page 219.

² Id., page 14.

³ Id., page 15.

⁴ Ibid.

⁵ Id., page 16.

⁶ Id., page 54.

⁷ Id., page 77.

⁸ Id., page 85.

infrequently (once or twice a year across the creek) and in a very small portion of the creek.⁹ ...

Loach minnow and Spikedace ... AMOUNT OR EXTENT OF TAKE ... The FWS does not anticipate incidental take of loach minnow and spikedace from the proposed action because no livestock grazing is permitted, trailing is limited so that it is not reasonably certain that fish would be affected, or areas where fish occur are generally inaccessible to livestock.¹⁰ ...

Table 4. Gila District Exlosures...Safford Field Office...Gila Box...Associated Allotment: Johnny Creek, Bonita Creek, Bull Gap, Morenci, Zorilla, Gila ...
Comments: Large complex enclosure intended to exclude livestock from the riparian areas of the Gila Box Riparian National Conservation Area (RNCA). The enclosure includes topography, allotment boundary fences, pasture fences, and gap fencing. It also includes water gaps constructed across the upper end of Bonita Creek (reservation boundary), the lower end of Eagle creek, the upper RNCA boundaries of San Francisco River and the Gila River."¹¹ ...

Center members and BLM employees have been reporting trespass and unauthorized cattle grazing within the Gila Box Riparian National Conservation Area for years. For example:

"The first herd of trespass livestock, approximately 15, was observed below Subia's private property on BLM managed lands. These cows belonged to Jeff Menges as evident from their brand (Figure 1). The second herd, approximately six, was observed at Gillard's Hot Springs. ... At three (Gillard's, San Francisco River at the confluence with the Gila River and Eagle Creek at the confluence with the Gila River) of the four monitoring sites we observed trespass cows or observed resource damage from the trespass livestock. Resource use throughout much of the Gila Box RNCA is heavy and on-going. The sloughing off of banks and the trampling and grazing of riparian vegetation is adding sediment to the river and creating a wider, shallower and warmer river channel. The level of use that was seen on this trip and previous trips is negatively affecting the fisheries ... The livestock are also eating and trampling willow and cottonwoods saplings, which is allowing salt cedar saplings to increase and spread. ... Trespass livestock are also negatively impacting recreational opportunities such as camping as our campsite at San Francisco River and the Gila River was scattered with cow manure and the only way to set-up camp and tents was to remove the cow manure. There was so much manure that it was impossible to have a clean camping site."¹²

In April, May and June 2021, the Center conducted intensive surveys of cattle impacts in riparian habitats with threatened and Endangered Species Critical Habitat designated on six BLM grazing allotments, Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap

⁹ Id., page 106.

¹⁰ Id., page 107.

¹¹ Id., page 219.

¹² Memorandum, to Tom Schnell, BLM Assistant Field Manager (Non-Renewable Resources), from Heidi Blasius, BLM Fisheries Biologist, Subject: Trespass Livestock and Vehicle Use within the Gila Box Riparian National Conservation Area (RNCA), June 6, 2013.

Community, along the Gila River, Bonita Creek and the mouths of the San Francisco River and Eagle Creek within GBRNCA.

Contrary to the commitments made by the BLM and USFWS through the ESA Section 7 process, Center surveys document widespread cattle grazing occupancy and damage and damaged or nonexistent exclusion fencing in numerous locations across the survey area.

Cattle are moving freely between the San Carlos Apache Reservation, private inholdings, and the BLM-managed Johnny Creek and Bonita Creek allotments along Bonita Creek and in areas on the Gila River not designated as grazing allotments. Cattle are causing significant impacts and deterioration to the Gila River, the Bonita Creek riparian ecosystem and the National Conservation Area as a whole.

Whether or not cattle from the San Carlos Apache Reservation cross private land onto BLM property is not relevant. Arizona is an "open range" or "fence out" state, where the responsibility for keeping cattle off of one's property is the responsibility of the landowner, not the responsibility of the neighboring rancher.¹³ In other words, if a property owner does not want livestock to enter their property, the property owner is responsible to put up and to maintain their own fence.

"An owner ... of land is not entitled to recover for damage resulting from the trespass of animals unless the land is enclosed within a lawful fence..."¹⁴

Besides failing to maintain riparian exclosures as promised and required by the May 21, 2012, Biological Opinion, BLM has failed to maintain its boundary fencing to protect its property.

NEW INFORMATION SINCE USFWS' MAY 21, 2012, BIOLOGICAL OPINION

This Notice documents that cattle can be found throughout GBRNCA and in major tributaries such as Eagle and Bonita Creeks. The cattle are causing severe and widespread damage to designated Critical Habitat.

Not a single mile of the GBRNCA is unaffected by cattle grazing. We observed moderate to severe environmental damage caused by cattle throughout the area. USFWS' assumption that cattle impacts would be limited to biannual crossings of Bonita Creek with moving from one pasture to another is not true.

The Gila River, within GBRNCA within the Zorilla, Gila, Morenci, Bull Gap Community, and Bonita Creek Allotments, is designated Critical Habitat for Yellow-billed Cuckoos. The Gila River within GBRNCA within the Bonita Creek Allotment is designated Critical Habitat for Southwestern Willow Flycatcher. Bonita Creek within GBRNCA within the Bonita Creek and Johnny Creek Allotments is designated Critical Habitat for Spikedace and Loach Minnow. The lower San Francisco River within GBRNCA within the Morenci Allotment is designated Spikedace and Loach Minnow Critical Habitat. GBRNCA also supports or is

¹³ Arizona Revised Statutes 3-1426, 3-1427.

¹⁴ Arizona Revised Statutes 3-1427.

important for the recovery of other federally listed species such as Gila Chub, Gila Topminnow, Desert Pupfish, Loach Minnow and Razorback Sucker.

We surveyed approximately twenty miles of Critical Habitat along the Gila River and its tributaries within GBRNCA between April 21st and June 1, 2021. We documented numerous cows and cattle grazing damage along these supposedly protected riparian corridors. We also note that several private inholdings are present in the area where, without BLM boundary fencing, cattle move seamlessly between these inholdings and BLM lands.

Cattle impacts increase in severity and frequency along Bonita Creek in the Bonita Creek Allotment moving upstream towards the San Carlos Apache Reservation. Cattle trails meander throughout the entire survey area including onto the Johnny Creek allotment and into private inholdings. In numerous open areas, riparian vegetation is heavily browsed, cattle feces pollute the water, shorelines are trampled, and soils are barren and compacted in cattle loitering areas.

We surveyed the Zorilla allotment on April 21, 2021. Severity and frequency of cattle impacts increased moving upstream to downstream. Streambanks and uplands along the Gila River are nearly completely severely degraded and damaged. There is little grass remaining along the River. There is widespread cattle grazing of cottonwood and willow seedlings. No functional boundary fencing exists between the Zorilla Allotment and the Gila Allotment as cattle trails pass throughout the area seamlessly.

Large swaths of riparian Critical Habitat are devoid of grass and understory vegetation on the Gila Allotment. Chronic as well as acute cattle grazing impacts indicate sustained cattle presence. In areas devoid of grass, cattle have shifted to browsing woody vegetation such as willow and mesquite. Streambanks are chiseled and shorelines are heavily trampled and degraded. Well-worn cattle trails traverse mesquite uplands devoid of grass and understory vegetation.

Many more miles of barren understory and degraded riverbanks are also found on the adjacent Morenci Allotment. Adjacent uplands are also similarly devoid of grass and understory vegetation.

Widespread areas of severely damaged streamside and upland habitat is also similarly found on the Bull Gap Community Allotment. Huge swaths of bare soil with dust bowl-like conditions are found. In places adjacent to the river where woody vegetation is thick, well-worn cattle trails lead to the water. Associated bank degradation is common and pervasive.

The Gila River in proximity to the intersection between the Twin C, Bull Gap Community, Tollgate and Bonita Creek allotments is not part of any designated grazing allotment; however, we document severe cattle impacts in this stretch of river similar to the other heavily damaged GBRNCA areas. This area is not within a designated allotment but is also being heavily damaged by cattle grazing.

The following are a sampling of images taken by Center staff between April 21 to June 1, 2021 documenting the GBRNCA destruction described above.



Severe grazing, ground compaction and bank degradation by along Bonita Creek within GBRNCA, 33.042306, -109.561711, June 1, 2021.



Streambank degradation, loss of streamside vegetation by cattle grazing along Bonita Creek, in the Gila Box National Conservation Area, 33.040201, -109.561389, June 1, 2021.



Streamside cattle grazing and streambank degradation along Bonita Creek, 33.021735, -109.561614, June 1, 2021.



Cattle grazing and streambank degradation along Bonita Creek, 33.030919, -109.562623, May 31, 2021.



Riparian cattle grazing streamside destruction along Bonita Creek, 33.031122, -109.563212, May 31, 2021.



Cattle grazing on cattails with streambank chiseling along Bonita Creek, 33.046376, -109.560637, June 1, 2021.



Grazed and trampled beaver-created wetland along Bonita Creek, 33.042455, -109.562118, June 1, 2021.



A cow along Bonita Creek, 33.044788, -109.560799, June 1, 2021.



Streambank degradation and fresh cattle hoofprints along Bonita Creek, 32.958212, -109.534846, May 6, 2021.



Fresh cattle feces next to grazed shoreline along Bonita Creek, 32.957203, -109.532572, May 6, 2021.



Cattle grazing and stream trampling along Bonita Creek, 32.956411, -109.531456, May 6, 2021.



Cattle trails meandering along Bonita Creek, 32.956411, -109.531456, May 6, 2021.



Cows along Bonita Creek on the Johnny Creek Allotment, 33.010108, -109.553535, May 31, 2021.



Streamside cattle grazing, feces, bank degradation and trampling along Bonita Creek, 33.010634, -109.555424, June 1, 2021.



Streamside cattle grazing and bank degradation along Bonita Creek, 33.010634, -109.555424, June 1, 2021.



Streamside cattle grazing, compaction, and bank degradation along Bonita Creek, 33.001035, -109.547159, June 1, 2021.



Feces laden cattle trails meander along Bonita Creek, (1) 32.998952, -109.546011, (2) 32.997692, -109.545282, May 31, 2021.

The Bonita Creek Allotment and the Johnny Creek Allotment interface along Bonita Creek. The Bonita Creek Allotment borders the San Carlos Apache Indian Reservation. Allotment boundaries cross Bonita Creek on BLM lands twice. On both occasions, fence lines are either inadequate or absent. Several private land parcels occur along Bonita Creek. No boundary fence lines protecting BLM property are found. There is seamless movement of cattle between private and BLM lands without the required protective boundary fencing to protect BLM lands. Along Bonita Creek, there is a small unfenced inholding owned by the City of Safford between the Reservation and BLM lands where no boundary fencing exists to protect the BLM property.



Cattle trails through the boundary fence between GBRNCA and City of Safford property near the San Carlos Apache Reservation along Bonita Creek, 33.052029, -109.561059, May 31, 2021.



A cattle trail passing through a nonfunctional fence line between the Johnny Creek and Bonita Creek Allotments, 32.969362, -109.53995, May 31, 2021.



A cattle trail passing through a downed fence between the Johnny Creek and Bonita Creek Allotments, 33.015427, -109.558811, June 1, 2021.



Cattle feces and grazed streamside habitat along the Gila River on the Zorilla Allotment, 32.964801, -109.322019, April 21, 2021.



Cattle feces and grazed riparian habitat on the Zorilla Allotment, 32.966205, -109.312663, April 21, 2021.



Cow trail leading to grazed and degraded streambanks along the Gila River on the Zorilla Allotment, 32.965053, -109.321933, April 21, 2021.



Severe overgrazing and ground compaction caused by cattle grazing above the Gila River in the Zorilla Allotment, 32.966709, -109.314809, April 21, 2021.



Streambank trampling and degradation caused by cattle grazing on the Zorilla Allotment, 32.966205, -109.312663, April 21, 2021.



Overgrazed and grazed habitat along the Gila River on the Gila Allotment, 32.972731, 109.351172, April 22, 2021.

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Trampling and streambank degradation impacting willow seedlings along the Gila River on the Gila Allotment, 32.972803, -109.35173, April 22, 2021.



Trampling, bank degradation and browsed willow seedlings along the Gila River on the Gila Allotment, 32.972299, -109.354963, April 22, 2021.



Cattle trampled streamside habitat with browsed willow seedlings along the Gila River on the Gila Allotment, 32.969184, -109.360971, April 22, 2021.



Cattle trampled and damaged streambank habitat along the Gila River on the Gila Allotment, 32.968932, -109.344521 (photo 1), 32.970745, -109.337625 (photo 2), April 22, 2021.



Cattle trampled and damaged streambank habitat along the Gila River on the Gila Allotment 32.970421, -109.336209, April 22, 2021.



Cattle feces and grazed habitat along the Gila River on the Gila Allotment, 32.964165, 109.33668, April 22, 2021.

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Cattle feces and trampled and damaged streambank habitat along the Gila River on the Gila Allotment, 32.961716, -109.336638, April 22, 2021.



Cattle trails leading to trampled and damaged streambank habitat along the Gila River on the Gila Allotment, 32.960015, -109.338555, April 22, 2021.



Mesquite bosque with cattle feces and grazed understory along the Gila River on the Gila Allotment, 32.965614, -109.346752, April 22, 2021.



Cattle feces and grazed streamside habitat along the Gila River on the Gila Allotment, 32.969881, -109.346781, April 22, 2021.



Cattle feces, trampled, grazed and damaged streambank habitat along the Gila River on the Gila Allotment, 32.972515, -109.3504, April 22, 2021.



Cattle trampled and damaged streamside habitat along the Gila River on the Gila Allotment, 32.976379, -109.366143, April 22, 2021.



Cattle trampled and damaged streamside habitat along the Gila River on the Gila Allotment, 32.975803, -109.370971, April 22, 2021.



Cattle trampled, damaged streamside habitat along the Gila River on the Morenci Allotment, 32.979091, -109.371443, April 22, 2021.



Cattle trampled and degraded streamside habitat along the Gila River on the Morenci Allotment, 32.978389, -109.372301, April 22, 2021.



Cattle trampled and degraded streamside habitat with grazed willow seedlings along the Gila River on the Morenci Allotment, 32.974801, -109.376192, April 22, 2021.



Cattle trampled and degraded streamside habitat with near complete removal of understory vegetation along the Gila River on the Morenci Allotment, 32.974603, -109.377673, April 22, 2021.



Cattle trails, trampling ground disturbances and reduced understory vegetation along the Gila River on the Morenci Allotment, 32.974819, -109.376192, April 22, 2021.



Cattle grazing, soil compaction and extensive streamside damage along the Gila River on the Morenci Allotment, 32.973811, -109.381263, April 22, 2021.



Cattle chiseled and damaged streambanks along the Gila River on the Morenci Allotment, 32.972998, -109.382715, April 22, 2021.



Cattle trampled and degraded streamside habitat with browsed willow seedlings along the Gila River on the Morenci Allotment, 32.973022, -109.385748, April 22, 2021.



Trampled and damaged streamside habitat along the Gila River on the Morenci Allotment, 32.972626, -109.388752, April 22, 2021.



Cattle grazing, trampling and bank chiseling along the Gila River on the Morenci Allotment, 32.971666, -109.390969, April 22, 2021.



Cattle trampled, damaged and degraded streamside habitat with grazed willow seedlings along the Gila River on the Morenci Allotment, 32.970334, -109.39423, April 22, 2021.



Cow trails, degraded streambanks and fouled water along the Gila River on the Morenci Allotment, 32.969109, -109.399552, April 22, 2021.



Cattle feces, and grazed mesquite bosque understory along the Gila River on the Morenci Allotment, 32.969481, -109.400039, April 22, 2021.



Cattle grazed habitat along the Gila River on the Morenci Allotment, 32.968689, -109.400983, April 22, 2021.



Cattle trampling and damaged streamside habitat including impacted willow seedlings along the Gila River on the Morenci Allotment, 32.967213, -109.402571, April 22, 2021.



Cattle trails and bank damage along the Gila River on the Morenci Allotment, 32.957815, -109.413257, April 22, 2021.



Cattle feces and trampled and damaged streambanks along the Eagle Creek on the Morenci Allotment, 32.965053, -109.408708, April 22, 2021.



Cattle feces and grazed streamside habitat along Eagle Creek on the Morenci Allotment, 32.964873, -109.412785, April 22, 2021.



Cattle, cattle trampled and grazed streamside habitat with compacted soils along Eagle Creek on the Morenci Allotment, 32.967393, -109.413171, April 22, 2021.



Cattle feces and grazed, damaged streamside habitat along the Gila River on the Morenci Allotment, 32.931969, -109.428506, April 23, 2021.



Cattle grazed and damaged streamside habitat along the Gila River on the Morenci Allotment, 32.953194, -109.411697, April 23, 2021.



Cattle feces, grazed habitat and cow wallows along the Gila River on the Bull Gap Community Allotment, 32.936093, -109.436274, April 22, 2021.



Cattle grazing and damaged streambanks along the Gila River on the Bull Gap Community Allotment, 32.93033, -109.441767, April 23, 2021.



Cattle feces and grazing along the Gila River on the Bull Gap Community Allotment, 32.93033, -109.441767, April 23, 2021.



Cattle grazed and grazed habitat along the Gila River on the Bull Gap Community Allotment, 32.934652, -109.447689, April 23, 2021.



Cow trail entry leading to water from grazed habitat above the Gila River on the Bull Gap Community Allotment, 32.92644, -109.454126, April 23, 2021.



Cattle grazed habitat along the Gila River on the Bull Gap Community Allotment, 32.925719, -109.459248, April 23, 2021.



Cattle grazing and bank shearing along the Gila River on the Bull Gap Community Allotment, 32.924351, -109.463711, April 23, 2021.



Streambank cattle trampling and willow seedlings grazing along the Gila River on the Bull Gap Community Allotment, 32.924351, -109.463711, April 23, 2021.



Cow trails meandering through grazed streamside benches along the Gila River on the Bull Gap Community Allotment, 32.921397, -109.463024 (photo 1), 32.92082, -109.461994 (photo 2), April 23, 2021.



Cattle feces and grazing along the Gila River on the Bull Gap Community Allotment, 32.919451, -109.461651, April 23, 2021.



Cattle feces, grazing and damaged streambanks along the Gila River on the Bull Gap Community Allotment, 32.919451, -109.461651 (photo 1), 32.935631, -109.436789 (photo 2), April 23, 2021.



Cattle trail with bank shearing along the Gila River on the Bull Gap Community Allotment, 32.934508, -109.44829, April 23, 2021.



Cattle grazing, damaged and degraded streambanks along the Gila River within GBRNCA, 32.919013, -109.459391, April 23, 2021.



Cattle grazing, trampling and degraded streambank along the Gila River within GBRNCA, 32.916467, -109.45374, April 23, 2021.

The Gila River, from near the borders of the Twin C Allotment and Bull Gap Community Allotment, at approximately 32.91966, -109.46024, and downstream to the intersection of Tollgate Allotment and Bonita Creek Allotment, at approximately 32.89555, -109.47573, is not part of any designated grazing allotment. Nonetheless, our surveys document cattle impact and damage along this stretch of river from unauthorized cattle. No functional fence lines were observed.

The following images were taken along the Gila River, within GBRNCA, in Yellow-billed Cuckoo Critical Habitat, that is not part of any grazing allotment.



Cattle feces on grazed uplands along the Gila River within GBRNCA, 32.90955, -109.460993, April 23, 2021.



Cattle grazed and damaged streambank along the Gila River within GBRNCA, 32.900566, -109.461622, April 23, 2021.



Cattle feces, grazed and compacted uplands and cattle trail along the Gila River within GBRNCA, 32.901972, -109.46012, April 23, 2021.



Cattle trail to grazed damaged streamside habitat with bank shearing along the Gila River within GBRNCA, 32.90818, -109.461079, April 23, 2021.

LEGAL BACKGROUND

The Endangered Species Act

Congress enacted the ESA to provide “a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” 16 U.S.C. § 1532(3).

Section 4 of the ESA directs the Secretary of the Interior to designate species that are threatened or endangered with extinction, and to designate “critical habitat” for such species. 16 U.S.C. § 1533(a). “Critical habitat” is defined as the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations, 16 U.S.C. § 1532(5)(A), and the ESA lays out a specific process for the designation and revision of such critical habitat. 16 U.S.C. §§ 1533(a) & (b). Section 4 also requires the Secretary to develop and implement recovery plans for the conservation and survival of threatened and endangered species, unless the Secretary finds that such a recovery plan will not promote the conservation of the species. *Id.*, § 1533(f).

Section 7 of the ESA requires federal agencies, in consultation with USFWS, to ensure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species, or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02.

Section 7(d) of the ESA requires that once an agency reinitiates Section 7 consultation, the agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d).

In addition to the obligation to avoid jeopardizing species or destroying or adversely modifying their critical habitat under Section 7(a)(2) of the ESA, Section 7(a)(1) imposes an obligation on all federal agencies, in consultation with the FWS, to “carry[] out programs for the conservation” of listed species. 16 U.S.C. § 1536(a)(1). This provision imposes an “affirmative duty on each federal agency to conserve each of the species listed.” *Sierra Club v. Glickman*, 156 F.3d 606,616 (5th Cir. 1998); *accord Pyramid Lake Paiute Tribe*, 898 F.2d at 1416-17 (noting that federal agencies have “affirmative obligations to conserve under [S]ection 7(a)(1)”). “Conserve” is defined by the ESA to mean *recovery*, *i.e.*, the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in the ESA] are no longer necessary.” 16 U.S.C. § 1536(a)(1).

For each proposed federal action, the action agency must request from USFWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present in such area, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If the action agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with USFWS. 50 C.F.R. § 402.14. To complete formal consultation, USFWS must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

If USFWS concludes that the proposed action will jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If USFWS concludes in the biological opinion that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, USFWS must provide an “incidental take statement” (“ITS”), specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that USFWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the BLM to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

To monitor the impacts of incidental take, the action agency must monitor and report the impact of its action on the listed species to USFWS as specified in the ITS. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action, the amount or extent of incidental taking is exceeded, the action agency must reinstate consultation with USFWS immediately. 50 C.F.R. § 401.14(i)(4).

The reinstatement of consultation is required and must be requested by the action agency or USFWS if discretionary federal involvement or control over the action has been retained or is authorized by law and (1) the amount or extent of taking specified in the ITS has been exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to a listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(a).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized "take" of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. "Take" is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9. 16 U.S.C. § 1536(o)(2).

In addition, action agencies, such as BLM must ensure their own compliance with the ESA; an action agency "cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species" merely by relying upon a BiOp, concurrence, or other consultation document issued by the USFWS. *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

LEGAL VIOLATIONS

BLM Has Violated, and Is in Ongoing Violation of ESA Section 7(a)(1)

Section 7(a)(1) imposes an affirmative obligation on all federal agencies, in consultation with USFWS, to "carry[] out programs for conservation" – i.e., recovery of listed species. 16 U.S.C. § 1536(a)(1).

The BLM Arizona State Director Raymond Suazo's and GBRNCA Manager Anthony Feldhausen's failure to carry out a program or otherwise take affirmative action to protect designated Critical Habitat is an ongoing violation of ESA Section 7(a)(1). Director Suazo and Manager Feldhausen have obviously failed to meaningfully address destructive unauthorized trespass cattle and permitted cattle grazing within GBRNCA on the six allotments at issue in the Notice, as well as portions of the Gila River within GBRNCA that are not in any designated allotment.

**USFWS' May 21, 2012, Biological Opinion and BLM's Reliance on this Biological Opinion
Violate ESA Sections 7 and 9**

This Notice presents irrefutable documentation of widespread destruction of designated Critical Habitat where (1) the amount or extent of incidental take is exceeded, (2) reinitiation of consultation is required as new information reveals that the effects of final actions, including the issuance of term grazing permits, AMPs, and AOIs or AOPs, are affecting listed species and Critical Habitat in a manner and to an extent not considered in the May 21, 2012, Biological Opinion, (3) BLM's final agency actions authorizing cattle grazing within GBRNCA, have been modified in a manner that causes effects to listed species and Critical Habitat not considered in the May 21, 2012, Biological Opinion, and (4) Critical Habitat for Yellow-billed Cuckoo has been designated since the May 21, 2012, Biological Opinion that is being severely damaged by cattle grazing administered by BLM Arizona State Director Raymond Suazo and GBRNCA Manager Anthony Feldhausen. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).

BLM Has Violated, and Is in Ongoing Violation of ESA Section 9

It is not disputable that trespass cattle grazing and unauthorized permitted cattle grazing are adversely affecting the listed species identified herein and their Critical Habitat in GBRNCA in a manner that constitutes “take” in violation of Section 9 of the ESA by killing, injuring, harming, harassing, and otherwise taking members of these species. Because BLM could eliminate (or at least significantly reduce) the risk of take by constructing and maintaining appropriate fencing and removing the trespass cattle and unauthorized permitted cattle, BLM Arizona State Director Raymond Suazo and GBRNCA Manager Anthony Feldhausen are “caus[ing] to be committed” unlawful take of listed species. 16 U.S.C. § 1538(a), (g); *see also* 50 C.F.R. § 17.3 (clarifying that take includes not only “an intentional or negligent act” but also any “omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering”). Thus, BLM, Arizona State Director Raymond Suazo and Gila Box Riparian National Conservation Area Manager Anthony Feldhausen must timely construct and/or maintain appropriate fencing and must remove the trespass cattle and unauthorized permitted cattle in order to halt their ongoing violation of that provision.

CONCLUSION

The Endangered Species Act establishes as the policy and the law of our Nation, a contractual belief and covenant about the respect for, and the commitment to the value and preservation of all rare and imperiled plants and animals:

“It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. ... The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide

a program for the conservation of such endangered species and threatened species...”¹⁵

As we have established in this Notice, BLM GBRNCA administrators Director Suazo and Manager Feldhausen, have failed to fulfill their professional and legal obligation to protect GBRNCA and the Endangered Species that represent and depend on the GBRNCA.

The Center and Maricopa Audubon look forward to hearing from you in response to this Notice. However, the Center will not delay filing a lawsuit for declaratory and injunctive relief as well as attorney and expert witness fees and costs, [16 U.S.C. § 1540(g)] if BLM GBRNCA administrators Director Suazo and Manager Feldhausen fail to take appropriate corrective actions within sixty days of receiving this letter.

This notice letter was prepared in good faith after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

CONTACT INFORMATION

If you have further questions, please contact Robin Silver, M.D., Center for Biological Diversity, P.O. Box 1178, Flagstaff, AZ 86002, by mail; by phone: (602) 799-3275, or by Email: rsilver@biologicaldiversity.org .

Sincerely,



Chris Bugbee
Southwest Conservation Advocate



Robin Silver, M.D.
Co-Founder and Board Member
Center for Biological Diversity

¹⁵ Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., Sections 2(b) and (c).